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Education Institute, an Oregon nonprofit corporation

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF OREGON

In re

The Michael King Smith Foundation,
Debtor.

Case No. 16-30233-rld11

**MUSEUM'S OBJECTION TO
DISMISSAL OF THE CASE**

The Evergreen Aviation and Space Museum and the Captain Michael King Smith Education Institute, an Oregon nonprofit corporation (the “**Museum**”), by and through its counsel, objects to dismissal of this chapter 11 bankruptcy case – as requested in the motion filed by the Office of the United States Trustee (the “**UST**”) on April 18, 2016 as Docket No. 50 (the “**Motion**”). The Motion, among other things, seeks dismissal of this case for “cause” under 11 U.S.C. § 1112(b). The Museum unequivocally objects to dismissal.

The Museum does not dispute any factual representations or legal authorities of the UST, as set forth in the Motion. Rather, the Museum contends that the “remedy” of dismissal is not in the best interests of the Estate, its creditors, or – as this is a potentially-surplus case – the Debtor and its purported beneficiary: the Museum.

A. Dismissal is not in the best interests of the creditors.

The Museum contends that when analyzing “cause” under 11 U.S.C. § 1112(b), the Court should evaluate the best interests of the creditors and the estate, and the prospects for a positive resolution. *See* COLLIER ON BANKRUPTCY ¶ 1112.04[5][a] (“As a general rule, if continuing a particular chapter 11 case would promote the twin goals of preserving viable

businesses and maximizing the creditors' return, then the case is probably not a candidate for conversion or dismissal under section 1112(b).”). “A movant bears the burden of establishing by preponderance of the evidence that cause exists to convert the case from chapter 11 to chapter 7, or to dismiss the case, whichever is in the best interest of creditors and the estate.” *In re Labankoff*, 2010 Bankr. LEXIS 5083, at *9 (9th Cir. BAP, June 14, 2010), citing *In re Pittsfield Weaving Co.*, 393 B.R. 271, 274 (Bankr. D.N.H. 2008) (emphasis added).

Furthermore, even if the Court finds that “cause” for dismissal exists, the Court then has the discretion to find that “unusual circumstances” apply and to determine that dismissal is “not in the best interests of creditors and the estate.” 11 U.S.C. § 1112(b)(2). This safeguard provision would apply to the extent that the Debtor or Museum can satisfy 11 U.S.C. § 1112(b)(2)(A) & (B). In this surplus case, there is a reasonable likelihood that a chapter 11 plan could be confirmed timely, to pay all creditors in full – thus satisfying subsection (A). Subsection (B) can be satisfied as long as the “cause” found is not “substantial or continuing loss to or diminution of the estate and absence of a reasonable likelihood of rehabilitation” under Section 1112(b)(4)(A). By its terms, this particular subsection (4)(A) requires that both requirements be met – *i.e.*, substantial loss or diminution and no reasonable likelihood of rehabilitation. The Museum contends that neither applies, at least at this time.

In this case, the Museum cannot unring the bell of the Foundation’s bankruptcy filing and the negative impact it created. However, now that the bankruptcy is pending, the case should be administered to completion. The Museum contends that a reorganization or organized liquidation under this Court’s supervision is possible, based on the surplus nature of the case.

Regardless of who requests dismissal or why, this is a unique case with unusual circumstances. The structure of the Bankruptcy Code, coupled with the oversight of this Bankruptcy Court and the UST, is essential in this particular Debtor’s case – to ensure that all of its creditors and interested parties are treated equitably, with the transparency and due process that the bankruptcy system provides.

B. An Overview of the Museum, in Relation to this Debtor and the Ch. 11 Debtor Evergreen Vintage Aircraft, Inc.

The Museum is one of multiple creditors of the Michael King Smith Foundation, and it is the Foundation's primary beneficiary and lessee of two of the buildings owned by the Foundation: the Waterpark and the Space Building. The Museum also uses the Foundation-owned Chapel for special events and memorial services, and it currently displays a number of Foundation aircraft at the Museum.

The Debtor's "sister entity" – a chapter 11 debtor-in-possession Evergreen Vintage Aircraft, Inc. is pending before this Court in Case No. 14-36770-rld11. Just like Evergreen Vintage Aircraft, the Foundation was created by Delford Smith to hold a portion of the real and personal property assets occupied and used by the Museum to advance its educational and scientific mission. Unlike these special-purpose entities, the Museum itself is a nonprofit organization overseen by the Oregon Department of Justice and managed by a completely independent board that is committed to continuing the educational and scientific mission of the Museum.¹

The Museum – besides operating the buildings and managing the assets of these chapter 11 debtor entities – also independently owns and manages its own assets. The Museum currently displays 135 aircraft and artifacts. The Museum owns 74 of these aircraft, including the Spruce Goose. Another 29 aircraft (including the highly valuable SR-71) are on loan from NASA, the Smithsonian National Air & Space Museum, the National Museum of the US Air Force, the National Museum of Naval Aviation, and the National Museum of the Marine Corps. Another 9 aircraft and artifacts are on loan from private museums, institutions and individuals, including the Kansas Cosmosphere and Space Center and the National Soaring Museum. These aircraft

¹ For the past three years, the Museum leadership has directed and managed a substantial overhaul in Museum governance, financial policies and safeguards, operational policies, leadership training and education – including Board of Director training, personnel, and community relations. These changes were designed to properly operate as a 501(c)3 nonprofit corporation – as the law requires, the Oregon Department of Justice expects, and the public deserves. The Museum is now reaping the rewards of its efforts, and it is on the path to sustainability.

total 113 (84%) of the 135 aircraft on display. The remaining aircraft are owned by the Foundation, George Schott, or the Collings Foundation.

The Museum is not just a collection of buildings and aircraft. The Museum is an asset and integral part of the Oregon educational community and the public at large. The Museum has eighteen educational partners, including, as examples, the McMinnville School District, the South Metro/Salem STEM Partnership, Sherwood School District STEM, Oregon State University, the University of Oregon, and Chemeketa Community College. A complete list of the Museum's partners and affiliates is attached as **Exhibit A**.

The Museum offers nineteen different educational programs and summer camps throughout its entire campus, including the Space Building and the Waterpark. These programs include the International Space Station Nanolab project, the VEX Robotic Tournament, Home School Days, Reaching for the Stars, the FIRST Robotics Tournaments, Civil Air Patrol, Boy Scouts events, Women in Aviation, and the spring, summer, and winter camps for students of all ages. The Museum also supports the McMinnville Engineering Aerospace and Sciences Academy and the Media Arts Career Pathway by providing classrooms, a robotics shop, and a full-production media studio for students. From January 2014 through June of 2015, more than 115,000 Oregon and Washington students, and another estimated 5,000 parents, teachers and school administrators, participated in those programs and camps at the Museum.

The Museum has the reputation of a world-class facility with valued relationships with government and private museums that are willing to loan aircraft and spacecraft to the Museum for display, knowing they will be properly cared for and properly presented to the public. To do so, the Museum employs 40 full-time employees and 114 part-time employees, including seasonal hires. The Museum has approximately 280 experienced docents (many are veterans) who, in the past two years, have donated 159,322 hours of work to the Museum.

In 2009, the Foundation completed construction of the Space Building, and the Museum began to lease and operate that building. The Space Building displays aircraft and

artifacts of the country's history of space exploration. The Space Building houses all the Museum classrooms and hosts many of the Museum's educational programs, camps, student tournaments, and science competitions described above.

The Waterpark, currently owned by the Foundation, opened to the public in 2011. The Waterpark is an indoor, state-of-the-art, educational waterpark facility that features a number of educational displays and exhibits and hosts programs, water safety classes, science and engineering classes, and special events during and after Museum hours. The Museum has been the only operator of the Waterpark. The Museum has an excellent safety record. For the past two years, the Museum received the Ellis and Associates Platinum International Aquatics Safety Award, which is their top award for aquatic safety certification.

The Foundation and the other debtor before this Court – Evergreen Vintage Aircraft – are truly sister entities: they have the same mission (intended to benefit the Museum), they hold similar assets (intended to benefit the Museum), and they are controlled by the same three trustees. As the UST's Motion explained, the trustees of the Foundation also manage Delford Smith's probate estate and various other related entities, including Evergreen Vintage Aircraft, and one served as legal counsel to many of the entities (and is therefore also a creditor).

The Museum recognizes that the debtor-entities' duties to their creditors must come before the Museum. The Museum is a creditor in this case, but it is also the primary beneficiary of the Debtor. Therefore, this case has a far-reaching affect on the Museum's members and its educational partners, visitors, and the local and regional communities the Museum serves – including the many veterans who serve as docents and whose history is honored within the Museum's buildings. As a result, there is a strong public interest component of this bankruptcy, which is best protected by this Court's oversight.

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C. The Court should exercise its discretion to oversee this bankruptcy case.

As the Debtor has contended, and as this Court initially noted in the initial case management hearing, this case should end up as a “surplus case” that would provide a net benefit to the Museum. However, even if no assets are left at the end of this case, this should be a case where a global resolution regarding the valuable assets can be struck among all of the interested parties, so that the assets are allocated to maximize their value and ensure that all constituencies are satisfied.

This Court’s retention of jurisdiction is also important in light of the Court’s history with the Vintage bankruptcy case. For example, enforcement of this Court’s orders in Vintage – including the terms of settlement mediated by Judge Perris and then approved by this Court – may become a contested issue in this proceeding and/or in the Vintage matter, should they continue to be ignored. The Foundation had agreed in the Vintage settlement to provide the Museum a 5-year, no-rent Waterpark lease, in exchange for significant releases of claims against the Foundation – including claims for avoidance of \$0 transfers of real property from Vintage to the Foundation, such as two high-value vintage aircraft (the P-51D Mustang and the Corsair FG-1D) that are valued at approximately \$3 million, and the \$0 transfer of the Waterpark and surrounding land (which is currently valued by the Foundation at \$42 million).

This Waterpark lease extension was a critical term of the global settlement. The lease was intended to ensure continued cash flow from the Waterpark to the Museum, so that the Museum would be able to meet its obligations to George Schott. Mr. Schott was the buyer of two buildings pursuant to the Vintage settlement. However, no such lease has been provided by the Foundation, contrary to its express obligations under the settlement. *See* Vintage Settlement Motion (Vintage Doc. 71), Ex. 1: Term Sheet, at 5 (“Upon entry of the [Settlement & Sale] Order, MKS will give Museum a 5 years no cost triple net lease on the Water Park....”). This situation is of particular concern because the proposed buyer in the Debtor’s pending sale (George Schott) participated in the global settlement, purchased two buildings in the Vintage

case, and now receives \$600,000 per year in rent payments from the Museum pursuant to 20-year, \$12 million lease that was negotiated in the context of the global settlement.

The interested parties in this bankruptcy are aware of, and the Museum has been forthright in, its interests and goals in this matter. The Museum's issues and goals are simple, straightforward, and should be easy to achieve. They are designed to ensure the Museum's long-term viability and the ability to continue its operations and programs for the benefit of its visitors, students, educators, parents, the local community, and the state.

The Museum's continued viability requires certainty and transparency. For the Museum to survive and thrive for the benefit of the local community and the state, the Museum needs certainty on what assets it has available, who will be its partners, what their intentions are, and how new owners see themselves supporting the Museum's long term goals. Some of this certainty is manifested within tangible commercial agreements, and some of this is developed through relationships. As with any organization, the lack of certainty substantially undermines its ability to advance its mission. Therefore, the Museum is looking for synergies and good working relationships with new owners who are like-minded, reliable, and can be trusted.²

² As tangible examples (for the benefit of the Court, any potential buyers, or other interested parties), the Museum has crafted ideas of how the issues and goals described above can be met with potential buyers interested in supporting the Museum:

1. An extension of the current Space Museum lease, no-rent, triple net for several years beyond the current extension. The original lease, which was executed in 2008, contemplated a series of extensions in five-year increments. The Museum is occupying the Space Building on the first of those extensions. Relying upon this provision, the Museum has built a substantial part of its operations, including its science and education programs and its educational partnerships, around long-term access to the Space Building.
2. The Museum's acquisition of the Space Building, through either a sale or gift, in the near future. The Space Building is important to the Museum for all the reasons stated above, and the Museum is actively soliciting partners to acquire the Space Building within the next three to five years.
3. Maintaining the most valuable of aircraft for display for the enjoyment of Museum visitors.
4. The actual execution of a five-year, no-rent, triple-net Waterpark lease allowing the Museum to operate the Waterpark through December 31, 2020. Almost a year has passed since this Court entered its Order in the Vintage Bankruptcy, yet there is still no agreement.
5. Recognition that the Museum's overhead significantly increased in the past year due to the Vintage Bankruptcy resolution, when the Museum went from paying no rent (as of 2013), including a no-rent lease on the Aviation Building through 2027, to a 20-year \$12 million lease on just the Aviation and Theater buildings. It is critical to the Museum's viability that a new owner does not use its economic power to force future access to buildings and property on terms that are not affordable.

The Museum believes that a positive outcome for the creditors, and the community, can be struck in this case. However, in a situation of such complexity – where the connections among parties and their counsel stretch among other interrelated bankruptcy cases and a large state probate case – the Museum contends that the creditors’ and community’s interests are best served through the transparency and structure of this bankruptcy proceeding, where due process is afforded, where this Court and the Trustee has oversight, and where a necessary and pointed analysis regarding any proposed sale can occur.

The Museum, like the UST, objected to the Debtor’s proposed sale that remains pending. The Museum agrees with the UST’s contentions that the sale motion is premature, defective, and would not benefit the Estate in its current form. *See, e.g.*, Motion at 11 (“It is not clear how the estate and creditors would benefit from the proposed sale of the Main Assets for less than the amount owed to secured creditors or how the case could be successfully concluded after the sale.”) If anything, the pending defective sale – which has not been withdrawn, yet lacks even a term sheet – demonstrates the need for this Court’s oversight. The Museum hopes that the bankruptcy process and its inherent safeguards will ensure that the Foundation and all interested parties – including all creditors, all other prospective buyers, and the Museum and its community – are protected by due process and transparency.

For these reasons, the Museum respectfully objects to the UST’s Motion to Dismiss this chapter 11 proceeding.

DATED: April 29, 2016.

LEONARD LAW GROUP LLC

By: /s/ Justin D. Leonard

Justin D. Leonard, OSB 033736

Counsel for Evergreen Aviation and Space
Museum and the Captain Michael King Smith
Education Institute, an Oregon nonprofit corp.

6. Resolution of the property taxes due to Yamhill County in a way that does not jeopardize the Museum’s operations, programs, or its permanent collection.

7. A transparent, final result where all interested parties and the public know and understand all aspects of every transaction and who the new owners will be.

EXHIBIT A

Evergreen Museum Education Programs Partnerships & Affiliations, Collections Partnerships & Affiliations

Education Programs

- McMinnville School District Girls STEM Camp
- McMinnville School District Migrant STEM Camp
- McMinnville School District STEM Experiences
 - First Grade (aerodynamics and structural design)
 - Third Grade (robotics)
 - Fifth Grade (Newton's Laws)
 - Sixth Grade (Engineering and Wave Physics)
- Sherwood Middle Schools – 6th grade STEM Experiences
- McMinnville High School EASA (Engineering, Aerospace and Sciences Academy)
- McMinnville High School Media Arts Career Pathway (SOAR Program)
- International Space Station Nanolab project with Valley Christian High School
- Reaching for the Stars (A day at Museum for special needs children)
- Lego League Qualifying Tournaments
- FIRST Lego League Qualifying Tournaments
- FIRST Tech Robotics Qualifying Tournaments
- VEX Robotics Tournament
- FIRST Lego League Junior Exposition
- Civil Air Patrol Aviation Business Academy
- Boy Scouts Merit Badges (Aviation, Space Exploration, Robotics, Engineering, Orienteering)
- Boy Scouts Wapiti Camporee
- Monthly Home School Days
- Summer Camps/ Spring Break Camps/ Winter Break Camps
 - Remote Control
 - Rocketry
 - Robotics
 - Astronomy/ Telescopes
- Women in Aviation Day
- Footlocker Curriculum
- Magic Planet Curriculum
- School Outreach Program – After School/In-school/Community

Education Partnerships and Affiliations

- McMinnville School District
- McMinnville High School Engineering & Aerospace Sciences Academy (EASA)
- NASA/JPL Museum Affiliate Program
- Oregon Space Grant Consortium – Museum is Affiliate Member
- South Metro/ Salem STEM Partnership
- Sherwood School District STEM Experience
- Oregon State University- College of Earth, Atmospheric and Ocean Science
- Valley Christian High School/Applied Math, Science and Engineering Institute
- The Marine Technology Society (through OSU)
- University of Oregon – Physics/Astronomy curriculum
- Chemeketa Community College – online science and technology courses
- Civil Air Patrol – National Cadet Activity and Squadron Headquarters
- Boy Scouts of America – Cascade Pacific Council
- American Association of University Women - Girls STEM Program
- Oregon After School Collaborative – Steering Committee Member
- VEX Robotics Tournament site
- Oregon Robotics Tournaments and Outreach Program (ORTOP)
- FIRST (For Inspiration and Recognition of Science and Technology) Robotics and Oregon Robotics Tournaments and Outreach Program (ORTOP)
- Greater Yamhill County Watershed Commission
- The McMinnville Fire Department
- The McMinnville Public Library
- Bonneville Power Administration

Aircraft, Artifacts and Collections Partnerships and Affiliations

- NASA's Johnson Space Center
- Smithsonian National Air & Space Museum
- National Museum of the US Air Force
- National Museum of Naval Aviation
- National Museum of the Marine Corps
- Kansas Cosmosphere and Space Center
- National Soaring Museum

CERTIFICATE OF SERVICE

I certify that on the date below, I caused this **MUSEUM'S OBJECTION TO DISMISSAL** to be served on interested parties requesting notice through the Court's CM/ECF system and the following parties by U.S. Mail:

NONE

DATED: April 29, 2016.

By: /s/ Justin D. Leonard
Justin D. Leonard, OSB 033736